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Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Universities Research Association, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered April 4, 1979.

OPINION BELOW.

The opinion entered in this case by the Circuit Court of Appeals is reproduced as Appendix A. Two opinions entered in this case by the District Court are reproduced as Appendix B (McGarr, J., entered October 8, 1975) and Appendix C (Leighton, J., entered November 29, 1977).

JURISDICTION.

This Petition relies upon 28 U.S.C. § 1254(1) for jurisdictional ground. The decision of the Court of Appeals was entered April 4, 1979 and a stay of issuance of mandate was granted.

QUESTION PRESENTED.

Whether the Court of Appeals, reversing the District Court, erroneously construed the Davis-Bacon Act[1] by holding that the District Court had jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract which was valid as between the contracting parties.

STATUTORY PROVISIONS INVOLVED.

The Davis-Bacon Act, as amended, is reproduced verbatim as Appendix D.

1. 40 U. S. C. § 276a *et seq.*

STATEMENT OF THE CASE.

Respondent (Plaintiff below) is an electronics technician who was employed by Petitioner (Defendant below) during the years 1972 through 1975. Petitioner is a not-for-profit incorporated research association representing approximately 50 universities located in the United States and Canada.

A contract between the United States and Petitioner has been in force at all times relevant to this lawsuit.[2] The contract requires that Petitioner as representative of the Nation's high energy physics research community provide scientific and technical management services to the United States in connection with the construction and operation of Fermi National Accelerator Laboratory.

The Laboratory (known as "Fermilab") is owned by the Federal Government. It consists of physics laboratories, research and administrative offices, maintenance facilities, and the world's largest proton accelerator system and is located on a 6800 acre site near Batavia, in Kane and DuPage Counties, Illinois. All funds and all supplies, equipment and other resources used by Petitioner are supplied by the United States, through the Department of Energy as contracting agency; the agency maintains its own office and staff at the facility. The contract authorizes Petitioner to employ scientific, engineering, technical, administrative and operative personnel in order to accomplish Petitioner's responsibilities at Fermilab. Funds for compensation of such

2. The contract originally was issued by the Atomic Energy Commission and designated United States Contract No. AT(49-8)-3000; it later was assumed in turn by the Energy Research and Development Agency and by the Department of Energy, as successors to the responsibilities and authorities of the Atomic Energy Commission. See Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) § 5801 *et seq.*; Department of Energy Organization Act, PL 95-91, 91 Stat. 565. The contract now is designated United States Contract No. EY-76-C-02-3000, but otherwise substantively remains unchanged.

personnel also are provided by the United States in accordance with salary and benefit schedules appended to the contract and pursuant to stipulations set forth therein.

Respondent's complaint alleges that he performed "construction work" at Fermilab while employed by Petitioner as an electronics technician. Count I of the Complaint asserts that the contract between Petitioner and the United States obligated Petitioner to compensate him at so-called "prevailing" construction labor rates for the "construction" work he allegedly performed. Count II asserts that the Davis-Bacon Act obligated Petitioner to pay Respondent such rates irrespective of the contract terms which authorized his employment.[3]

The District Court dismissed Count I after examining the contract, finding no Davis-Bacon Act provisions, and, in turn, no basis therein to support Respondent's claim that the contract expressly obligated Petitioner to pay Respondent at so-called Davis-Bacon Act prevailing construction labor rates. See Appendix B hereto, and the opinion of the Court of Appeals at pp. A2, 4, hereto. Central to that ruling was the following provision of the contract:

> "This contract does not contemplate the performance of work by the Association [Petitioner herein] with its own employees, which the Commission [formerly Atomic Energy Commission, now Department of Energy] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work." (As correctly quoted by the Court of Appeals; see pp. A5, hereto.)

The District Court held that the foregoing provision would not support a claim for construction labor rates pursuant to the

3. The Complaint includes several other counts seeking comparable relief on the basis of assorted common law theories.

Davis-Bacon Act and/or the contract unless Respondent could show that the government contracting agency expressly had determined that the work for which such wages were claimed was subject to Davis-Bacon Act and had authorized Petitioner to perform it with its own employees. (Appendix B hereto at p. A17.) The case was left open to permit Respondent an opportunity to prove the existence of such a determination, if he could. Count I, accordingly, was dismissed.

Respondent thereafter attempted by means of Freedom of Information Act procedures, discovery depositions of seven officials of Petitioner, and a discovery deposition of an official of the Department of Energy contracting agency to determine whether the agency had rendered a Davis-Bacon Act coverage determination regarding work he performed. He found none.

In addition, Petitioner's general counsel submitted an affidavit that no such determination had been made.

Accordingly, Petitioner moved for issuance of a summary judgment as to Count II and the pendant common law counts. On November 29, 1977, the District Court granted the motion. The Court noted Respondent's failure/inability to identify any contract basis for his claim and held that it would be improper for the Court to declare in the first instance that the contract is subject to the Davis-Bacon Act and to make wage determinations for the parties. (See Appendix C hereto at p. A27.)

Respondent appealed to the Court of Appeals from the District Court's second ruling.

On April 4, 1979, the Court of Appeals reversed the District Court. It held that the District Court did have jurisdiction to determine whether Respondent performed construction work, and to revise the contract if the Court found that he did perform such work. The Court also held that Respondent would not be required to exhaust administrative remedies, and that Respondent had standing to sue, all irrespective of the lack of any showing that the contracting agency had made a Davis-Bacon Act coverage determination with respect to his work.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

THE NOVEL AND UNPRECEDENTED DECISION OF THE COURT OF APPEALS PRESENTS AN EXTREMELY IMPORTANT FEDERAL QUESTION WHICH MUST BE RESOLVED BY THIS COURT.

A. The Court's Decision Is a Wholesale Departure from Existing Law Relative to Government Contracting.

The Davis-Bacon Act is one of three basic labor contract standards statutes enacted by Congress to regulate federal contracting.[4] Each vests the Secretary of Labor with regulatory authority to interpret its substantive terms, including those dealing with coverage. 40 U. S. C. § 276c.; 41 U. S. C. § 38; 41 U. S. C. § 353(a). The Courts have held repeatedly and definitively that the Secretary of Labor, not the Courts, is ultimately responsible for determining such coverage. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 63 Sup. Ct. 339 (1943); *Nello L. Teer* v. *United States,* 348 F. 2d 533, 539-40 (Ct. Cl., 1965); *Curtiss-Wright Corp.* v. *McLucas,* 364 F. Supp. 750 (D. N. J. 1973); *March 9, 1979 opinion of the Attorney General of the United States,* 58 Daily Labor Report D-1 (BNA, March 23, 1979). In *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940), this Court clearly held that judicial intervention into the authorities of the Secretary of Labor under the contracting statutes would constitute blatant violation of the doctrine of separation of powers, and would not be allowed. *Id.* at 310 U. S. 127-129; 60 Sup. Ct. at 876-877.[5]

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4. The Walsh-Healy Act, 41 U. S. C. § 35 *et seq.,* and the Service Contract Act, 41 U. S. C. § 351 *et seq.* are the others.

5. *See also, United States* v. *Binghamton Const. Co.,* 347 U. S. 171, 74 Sup. Ct. 438 (1954), citing with approval the *Endicott*

(Footnote continued on next page.)

It is equally well settled that the courts have no jurisdiction to alter a government contract. *United States* v. *Joseph A. Holpuch Co.*, 328 U.S. 234, 66 Sup. Ct. 1000 (1946); *International Association of Machinists* v. *Hodgson*, 515 F. 2d 373 (2nd Cir. 1975); *Framlau Corporation* v. *Dembling*, 360 F. Supp. 806 (E. D. Pa. 1973).

The decision of the Court of Appeals, that the District Court would have jurisdiction to refashion, retrospectively, government contract provisions mandated by Department of Energy Regulations approved by the Department of Labor (41 C. F. R. § 9-18.702 *et seq.*) on the basis of its own finding that work performed was "construction" work as the Court may define the term, is in stark contrast to the foregoing body of settled case law. The Court of Appeals' decision represents such a gross departure from all prior judicial opinion except its own in an arena—federal contracting—of extreme national importance, that this Court must grant review in order to preserve federal contracting stability and restore consistency within the federal judiciary.[6]

(Footnote continued from preceding page.)

Johnson and *Lukens Steel* decisions, and also citing with approval the early decision of the Fifth Circuit Court of Appeals, *Gilloz* v. *Webb*, 99 F. 2d 585 (5th Cir. 1938), holding that a determination by the Secretary of Labor is a non-reviewable condition precedent to suit for recovery of wages allegedly required to be paid pursuant to Davis-Bacon Act.

6. The only prior judicial incursion into the area is represented by the Court of Appeals' decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded*, 423 U. S. 810, 96 Sup. Ct. 20 (1975), decision on remand, 548 F. 2d 689 (7th Cir. 1977), *cert. den.*, 434 U. S. 1033, 98 Sup. Ct. 765 (1977). However, that decision was confined to the question whether express Davis-Bacon Act wage rate stipulations (assuming the existence thereof) would be subject to judicial enforcement, as an alternate remedy, upon a showing that the usual statutory remedy was inadequate, 512 F. 2d at 588, 584 F. 2d at 692; *United States for use and benefit of Glynn* v. *Capelletti Bros.*, 448 F. Supp. 66 (S. D. Fla. 1978). By its latest decision in this case, the Court of Appeals has not only recognized the existence of a *remedy*, it now has authorized the District Court to create the *right*, as it freely admits. A12.

B. The Court of Appeals Has Introduced a Grave Uncertainty Into All Federal Contracting.

The Court of Appeals now has placed federal contractors subject to its jurisdiction at risk of having their federal contracts rewritten by the federal district courts to create obligations not voluntarily assumed, and not contemplated by the contracting parties. It holds that the Federal District Courts have jurisdiction to insert new terms into a completed federal contract and enforce such new terms at the instance of a third party, notwithstanding the absence of any determination by the government contracting agency.

The practical effect of this decision will be to discourage all contractors from accepting federal contracts so long as the potential exists for *ex post facto* judicial revision of the terms.

To appreciate the enormity of the Court's holding, the position of the Petitioner must be considered: here is a *not-for-profit*[7] education and scientific research entity assisting the Department monies supplied directly for that purpose and strict ac- the United States' leadership position in scientific research.[8] That entity, Petitioner herein, exists solely to provide such assistance to the government, spends funds only as the government allows, directs and provides, employs only such employees as the government allows, and compensates such employees with government monies supplied directly for that purpose and strict accordance with salary and benefit schedules set forth in the contract.

Petitioner employed Respondent to operate computers monitoring the operation of the proton accelerator system and to

7. Under the contract, Petitioner is paid a fixed "management allowance" which must be spent in furtherance of the scientific mission of the Laboratory (*e.g.*, to sponsor scientific symposia, lectures and demonstrations) and is subject to government audit.

8. That mandate originally was spelled out in the Atomic Energy Act of 1954 (42 U. S. C. §§ 2011, 2031, 2051 *et seq.*) and passed to the Department of Energy via the Energy Reorganization Act of 1974 (42 U. S. C. (Supp. V), § 5801 *et seq.*).

perform related tasks in aid of the research program; Respondent was paid in accordance with the contract rate schedules.

Now, however, the Court holds that Petitioner may be liable for retroactive payment of additional compensation to Respondent based on wage schedules which were not included in the contract if Respondent can prove after the fact that his work was "construction" work, as the District Court may construe that term, despite the fact that the contracting agency has made no such determination, and despite the fact that the contract expressly conditioned payment of Davis-Bacon Act prevailing rates upon a prior determination by the government that the work paid for thereby was covered.[9]

Introduction of such uncertainty into the processes of government contracting surely will compromise severely the government's ability to function, particularly in the areas of research and development. This Court must review that decision in order to preserve and protect the government's authority to contract effectively.

C. The Court of Appeals Decision Conflicts with the Express Terms of the Statute.

(a) The Decision Divests the Secretary of Labor of His Statutory Authority.

The Davis Bacon Act directs agencies of the Executive Branch to include certain minimum rate provisions in bid specifications for any contract covering "construction, alteration and/or repair . . ." of public buildings and works if the contract requires that the contract utilize "mechanics or laborers." 40 U. S. C. § 276a. Its purpose is to foster social policy by eliminating pay rate differentials as bases for competitive bidding on federal contracts. *March 9, 1979 opinion of the Attorney General of the United States,* 58 Daily Labor Report D-1 (BNA, March 23, 1979 at pp. D-1, D-2).

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9. The condition flows logically from the fact that the government, not the contractor, is responsible for providing funds for employee compensation, under this contract.

Authority to define terms such as "construction, alteration and/or repair," to determine applicable minimum rates and the classes of "mechanics or laborers" subject thereto, and to administer and enforce the Act generally, is vested in the regulatory discretion of the Secretary of Labor. 40 U. S. C. § 276c; Reorganization Plan No. 14 of 1950, 15 F. R. 3176, 64 Stat. 1267.

Regulations adopted in pursuit of that authority are codified at 29 C.F.R. Part 5, Subpart A and are recognized to have the force and effect of law. *Perkins* v. *Lukens Steel Co., supra; Framlau Corp.* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973).

Congress thus plainly vested the Secretary of Labor with responsibility to carry out the policies of the Act by granting him authority to determine coverage, to determine applicable rates and applications, and to enforce its terms. In turn, the Secretary has established a broad administrative and regulatory scheme in discharge of his responsibilities.

The Seventh Circuit Court of Appeals recognizes this authority of the Secretary of Labor. A4, 9-10 at fns. 6 and 11. Inexplicably, however, the Court rejected Petitioner's position that such authority was exclusive or at least subject to an exhaustion requirement; it held that while "there may be an exhaustion requirement" (A4 at fn. 6), this plaintiff (Respondent herein) was not subject to it and had standing to seek a completely *de novo* judicial determination that his work was covered by the Act (A9-10). The Court thus has divested the Secretary of Labor of his statutory authority to regulate the labor provisions of government contracts and has held that the District Court has jurisdiction to ignore the existence of a valid contract between Petitioner and the Department of Energy.

The ruling is in direct conflict with the decision of the Court of Appeals for the District of Columbia in a case arising under a companion contracting statute, *International Associa-*

tion of Machinists and Aerospace Workers, AFL-CIO v. *Hodgson,* 515 F. 2d 373 (C. A. D. C. 1975) at 379, holding that the District Court would not have jurisdiction to refashion a valid government contract in order to provide third parties with a remedy against the contractor. It is in direct conflict with this Court's opinions in *Endicott Johnson* v. *Perkins,* 317 U. S. 501, 507-09, 63 Sup. Ct. 339, 342-43 (1943) and *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940) as well as the decisions cited in part A above, all holding the authority of the Secretary of Labor under the contracting statutes to be exclusive. It is contrary to the long line of cases bottomed on this Court's decision in *Far East Conference* v. *United States,* 342 U.S. 570, 574-75, 72 Sup. Ct. 492, 494 (1952), holding that the federal courts must defer to the primary jurisdiction of Executive Branch Agencies vested by Congress with authority to resolve questions of application of regulatory statutes.[10]

The question whether Congress intended the Secretary of Labor to be the exclusive or primary arbiter of coverage and application disputes arising under the Davis-Bacon Act and other contracting statutes, or whether Congress intended that the various District Courts would have parallel jurisdiction *de novo* to resolve such disputes is of extreme national importance. Equally important is the question whether Congress intended that such disputes be resolved prior to performance of the contract or authorized the Courts effectively to revise a contract after or during performance. By its decision, the Court of Appeals has squarely departed from all prior judicial opinion on these issues. Its decision sets up a gross conflict and will foster confusion and uncertainty in what heretofore had been a settled area of the law. This Court must take jurisdiction of the

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10. *Cf. Curtiss-Wright Corporation* v. *McLucas,* 364 F. Supp. 750 at 769-773 (D. N. J. 1973) and cases cited therein as illustrations of application of the primary jurisdiction principle to questions of labor contract statute coverage.

case to re-establish order in the matter of government contracting.

(b) The Decision Conflicts with the Statutory Wage Rate Provisions.

Section 276a of the Davis-Bacon Act clearly provides that wage rates and other stipulations required by it are to be published as part of the bid specifications issued prior to contracting. A contractor thus must be given advance notice of the obligations he will assume if he enters into the contract; he is free to contract or not as he chooses based on such notice. The advance notice principle repeatedly has been recognized by this Court, *Perkins* v. *Lukens Steel Co., supra,* 310 U. S. at 127-129, 60 Sup. Ct. at 876-7, and by all other courts as well. *See, e.g., Gilloz* v. *Webb,* 99 F. 2d 585 (5th Cir. 1938):

> "The only difference between the function of the Secretary under the Act as originally drawn and under the Act, as amended, is that under the original Act the Secretary, as here, fixes the rate to be paid after a dispute has arisen and it then becomes part of the contract, while *under the Act as amended the Secretary fixes and writes it into the contract in advance.*" 99 F.2d at 587. (Emphasis added.)

Here, Petitioner's advance notice was that its contract did not contemplate performance of Davis-Bacon Act work by its employees, and would not require payment of Davis-Bacon Act rates absent a prior government determination that the work was covered thereby (A5).

The Court of Appeals, however, held that the rate may be fixed after the dispute has arisen, and by the Court, itself, under the guise of deciding whether or not the work was "construction," and regardless of any determination of coverage by the government.

Moreover, the Davis-Bacon Act also expressly provides that it:

> "shall not be construed to supersede or impair any authority otherwise granted by federal law to provide for establishment of specific wage rates." 40 U. S. C. § 276a-3.

The Court of Appeals expressly construed the Davis-Bacon Act to supersede statutory and regulatory authority granted the Department of Energy to enter into contracts, including contracts of the type which is before the Court providing for contractor payment of compensation at rates fixed by the Department of Energy and with funds provided directly by the Department of Energy for that purpose.[11] (A11)

The Court of Appeals' decision patently ignores the plain words of the statute; it injects a gross uncertainty into federal law respecting government contracting, and it therefore must be reviewed.

D. The Decision of the Court of Appeals Recognizes a Right of Action Not Contemplated by Congress.

The Court of Appeals held that the Respondent possessed legal standing to sue on his wage claim and was not limited to his statutory remedies.[12] Its holding suggests that each and every person employed under a federal contract has direct right of access to the federal courts to seek judicially made Davis-Bacon Act wage and coverage determinations as to his or her work, and to seek enforcement of such determinations against the contractor, retrospectively. The Court holds that such plaintiffs are

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11. *See* Atomic Energy Act of 1954, 42 U. S. C. §§ 2051, 2201(p) vesting such contracting and regulatory authority in the Atomic Energy Commission, and Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) § 5801 *et seq.*; Department of Energy Organization Act, PL 95-91, 91 Stat. 565, vesting authorities possessed by the AEC in the Department of Energy. Applicable regulations are codified at 41 C. F. R. Parts 1 and 9; *see esp.* 41 C. F. R. §§ 9-1.104, 9-15.5006 and 41 C. F. R. § 1-18.701-1.

12. Citing its own decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded*, 423 U. S. 810, 96 Sup. Ct. 20 (1975), 548 F. 2d 689 (7th Cir. 1977), *cert. den.*, 434 U. S. 1033, 98 Sup. Ct. 765 (1977). As noted above, however, the Court in the instant case went far beyond the remedy question and held that the District Court not only had jurisdiction to provide a forum but also had jurisdiction to refashion the contract in order to provide a new right.

not limited to the remedies and procedures afforded by the Act or by the terms of the subsisting contract and need not first seek administrative review or enforcement.[13]

The Congress plainly did not create for individual employees a private right of action to enforce Davis-Bacon Act contract specifications against a private contractor. Certainly there is no expression of such a right within the Act, as was noted by the Court in *McDaniel,* 548 F. 2d at 693. As against the contractor, all of the remedies set forth in the Act contemplate administrative action and/or prosecution by the government contracting agency. That scheme obviously is bottomed upon recognition generally of the government's preeminent need to maintain control of its contract relationships with private contractors, and in particular the government's exclusive authority to determine coverage in specific cases. *Perkins* v. *Lukens Steel Co., supra.* Therefore, by recognizing an implied right of direct action against a contractor for the benefit of employees working under government contracts, the Court of Appeals has created a potential for massive judicial interference with the orderly processes of government contracting. The potential exists for disruptive suspension of work-in-progress, continual renegotiation of contracts, and, obviously, substantial withdrawal from the government contracting arena by contractors, such as your Petitioner, providing valuable research, development and other professional and scientific services.

It is submitted that this important question must be reviewed, notwithstanding the denial of certiorari in the *McDaniel* case, because the Court of Appeals has now ruled that the implied

13. The Court of Appeals argues, in justification of this novel theory, that statutory remedies are inadequate because the contracting agency itself could not require Petitioner to pay more money than it has paid for work already performed because there are no stipulations in the contract requiring such payment. A9-10 at fn. 11. Petitioner respectfully wonders how a contract which is binding on the contracting parties—indeed, upon a government contracting agency with abundant enforcement authority—can be altered by the Court at the behest of a third party.

right of action against the contractor will be recognized even where it is clear that no Davis-Bacon Act stipulations exist or were ever intended to exist, as between the contracting parties. Whatever may be said regarding the right of an employee to enforce express stipulations running to his advantage which the government chooses not to enforce on his behalf, there is clearly no warrant in law to recognize a right of action against a contractor to *create* such obligations and then to enforce such judicially-created obligations against the contractor. Such action by the Court of Appeals is utterly inconsistent with this Court's previous rulings.[14]

In *Cort* v. *Ash, supra,* this Court identified four considerations necessary to implication of a private right of action under a federal statute: (1) whether or not the plaintiff is an especial beneficiary of the statute; (2) whether or not the legislative intent is apparent; (3) whether or not recognizing a private right of action would be consistent with the legislative scheme; and (4) whether or not the cause of action is one traditionally relegated to state law. *Cf. Cannon* v. *University of Chicago,* ..... U. S. ....., ... Sup. Ct. ....., 47 Law Week 4549 (May 14, 1979), at footnote 9. Assuming, *arguendo,* that the matter is federal in nature, each of the other three circumstances plainly militates against implication of a Congressional intent to provide a private right of action.

Thus, while the plaintiff would benefit if the federal contract were rewritten to incorporate the new wage rates he seeks, it is doubtful that he can properly be considered an "especial" beneficiary of the law; this is so because the contract under which he was employed contemplates that construction work would not be performed by persons in his situation, but, rather, would be subcontracted.

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14. *Cort* v. *Ash,* 422 U. S. 66 (1975); *Securities Investor Protection* v. *Barbour,* 421 U. S. 412 (1975); *United States* v. *Babcock,* 250 U. S. 328 (1935).

Furthermore, implication of a private right of action clearly would be utterly inconsistent with the legislative history.[15]

Finally, a right of action not only to enforce *existing* federal contract provisions but to seek retrospective alteration of federal contract terms and conditions would be utterly and completely contrary to the legislative scheme. That scheme, as noted above, was intended to establish pre-contract conditions in order to eliminate bidding based on wage rate differences; integral thereto is the regulatory control delegated to contracting agencies and the Secretary of Labor. Implication of a private right of action retrospectively to alter a contract deemed valid as between the government contractor and the government plainly would frustrate the legislative scheme, would invade the discretionary responsibilities of the Executive Branch, and would introduce grave uncertainties into all federal contracts.

Under principles which are well established by this Court's prior decisions, therefore, recognition of a private right of action to alter a federal contract in the circumstances of this case must be deemed contrary to legislative intent. The Court of Appeals' action in the case obviously is so thoroughly at odds with the legislative intent and potentially so destructive of orderly federal contracting, it must be reviewed by this Court.

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15. A succinct analysis of the relevant legislative history is made by the Solicitor General of the United States in his *amicus curiae* brief filed with this Court in *University of Chicago* v. *McDaniel*, 434 U. S. 1033 (No. 76-1464, 1977) at pp. 16-19. As noted therein, the Solicitor General found in the legislative history a clear indication that Congress did not intend to create such a right of action. The Solicitor General's opinion is buttressed by the fact that no implied right of action had been thought necessary to achieve the purposes of the Act during the first 45 years of its history, and despite repeated legislative inquiries as to its administration.

CONCLUSION.

For the reasons stated, Petitioner respectfully requests this Court to grant its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendices

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1165

STANLEY E. COUTU, et al.,
Plaintiffs-Appellants,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 1129—George N. Leighton, *Judge.*

HEARD DECEMBER 6, 1978—DECIDED APRIL 4, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action was brought by plaintiff, an electronics technician,[1] and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U. S. C. § 276a *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and

1. Plaintiff was employed by defendant at the Fermi National Accelerator Laboratory from 1972 until he resigned three years later.

operate the Fermi National Accelerator Laboratory in Batavia, Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U. S. C. § 276a(a). We held in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F. 2d 689 (7th Cir. 1977), certiorari denied, 434 U. S. 1033, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement.

Plaintiff and his class alleged in their "First Cause of Action" (hereinafter "Count I") that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages "required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act" (App. 2). Count I was dismissed in an unreported October 8, 1975, memorandum opinion and order of Judge McGarr. However, that order did not dismiss the remaining six Counts of the complaint.

On August 10, 1976, Judge Leighton, to whom the class action had been transferred, certified the plaintiff class.[2] Dis-

2. The class was described as follows:

"All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT (49-8)-3000 between defendant and the United States of America 'for construction, alteration

(Footnote continued on next page.)

covery was apparently stayed in February 1977.[3] In March 1977, defendant filed a motion for summary judgment. In November 1977, Judge Leighton handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." In this memorandum order, the district court noted that no Davis-Bacon Act stipulations requiring the payment of prevailing wages were ever made a part of the contract between defendant and the United States.[4] The court noted that the plaintiff class was relying on Article XXXIII of the contract providing that the contract did not contemplate the performance of work by defendant with its own employees "which the Commission [now the Energy Research and Development Administration (ERDA)[5]] determines is subject to the Davis-Bacon Act" and that such work was to be procured by subcontracts containing "the [Davis-Bacon] provisions relative to labor and wages required by law." The court then held that the contract failed

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(Footnote continued from preceding page.)

> and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been paid wages less than 'the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*"

3. Plaintiff apparently relies on Judge Leighton's minute order of February 18, 1977, stating "P/T completed" to show discovery was thereby stayed. Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975.

4. In this respect, the court relied on an affidavit of John R. Frazier, chief legal counsel for the Fermi National Accelerator Laboratory. As will be seen, this affidavit does not resolve the controversy.

5. ERDA is the successor to the Atomic Energy Commission.

to contain the "requisite Davis-Bacon Act specifications for maintenance of the claims stated in Count II" and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them "due to the legally insubstantial nature of the federal claims." Therefore, the complaint was dismissed in its entirety.

No notice of appeal was filed with respect to Judge McGarr's dismissal of Count I of the complaint, so that the principal question before us is whether Count II, asserting that defendant breached contractual obligations to the members of plaintiff class, was properly dismissed. At the outset, the parties disagree on what was decided by Judge McGarr and therefore what remained to be decided by Judge Leighton. The defendant insists that only two narrow fact questions were left open by Judge McGarr: (1) whether the contract actually contained Davis-Bacon Act stipulations and, if so, (2) whether Davis-Bacon Act work was performed by members of the plaintiff class. If this were all that was left for Judge Leighton to decide, the affidavit that there were no Davis-Bacon Act stipulations (n. 4 *supra*) might require affirmance of the summary judgment. However, we do not believe that Judge McGarr reduced the suit to a simple case of whether express wage stipulations in the contract had been breached. On the contrary, in dismissing Count I Judge McGarr held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover.[6] Clearly

6. There is some support for the proposition that if work covered by the Davis-Bacon Act happens to be performed under a contract which did not intend that such work be performed by anyone, it is not covered by the Act. 40 Comp. Gen. 565 (1961). This interpretation, however, raises the additional question of who is to decide whether a contract is subject to the Act. Judge McGarr appeared to accept defendant's contention that authority to make this determination was accorded exclusively to the executive departments so that their decisions in this regard are not subject to judicial review (App. 23). We note in addition that even if such administrative action is reviewable, there may be an exhaustion requirement. We do not decide any of these questions, since they are not before us.

if a contract contains the required wage stipulations, this would show that it was a Davis-Bacon Act contract. Judge McGarr apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

Thus two theories of recovery remained open to the plaintiff class after Judge McGarr's dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit (n. 4 *supra*) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

The key provision in the Contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> "This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work."

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by

plaintiff and his class. We agree that if the defendant actually performed such work with its own employees at the Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra.*

McDaniel involved a government contract clause which is virtually identical to Article XXXIII of this contract. The contract at issue in *McDaniel* was between the Atomic Energy Commission and the University of Chicago for operation of the Argonne National Laboratory. That contract barred the University of Chicago from construction work of a kind subject to the Davis-Bacon Act. As with Article XXXIII of the present contract, the University of Chicago was to have all Davis-Bacon Act work performed by subcontractors.[7] We held that the construction or alteration work performed by the University of Chicago was subject to the provisions of the Davis-Bacon Act

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7. The applicable clause of the *McDaniel* contract between the University of Chicago and the Atomic Energy Commission provided:

> "26.5 *Davis-Bacon and Other Labor Provisions for Construction Subcontracts.*
>
> "The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.
>
> * * * * *
>
> "Supplement No. 16, Appendix D."
>
> (quoted at p. 1a of the Solicitor General's *amicus curiae* brief on petition for a writ of certiorari from the Supreme Court in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033.)

even though the contract lacked a stipulation requiring the payment of Davis-Bacon Act wage rates, stating:

> "There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U.S.C. § 276a required the specifications to 'contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work' in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of machanics and laborers by the contractor or subcontractor." (512 F. 2d at 584.)

Similarly here, the provisions of the Davis-Bacon Act must be read into Article XXXIII when, pursuant to a contract requiring Davis-Bacon Act work, the defendant performs "construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers." Section 1 of the Davis-Bacon Act applies to such work in government contracts in excess of $2,000 and mandates that an employer must pay "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the * * * subdivision of the State in which the work is to be performed * * *." 40 U. S. C. § 276a.

Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract

was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

McDaniel was not an isolated instance of reading applicable statutory requirements into government contracts. We were merely following precedents established as early as 1827 and applied consistently thereafter.[8] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act "stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in" the contract (see n. 4 *supra*) is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff to tender a counter-affidavit.

It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity

8. See, *e.g.*, *Ogden* v. *Saunders*, 25 U. S. (12 Wheat.) 212 (1827); *Woods* v. *Lovett*, 313 U. S. 362, 370; *G. L. Christian & Associates* v. *United States*, 312 F. 2d 418, 320 F. 2d 345 (Ct. Cl. 1963), certiorari denied, 375 U. S. 954; *United States* v. *New Orleans Public Service Inc.*, 553 F. 2d 459, 469 (5th Cir. 1977); *Campagnie Générale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 666 (2d Cir. 1929); *City of Tullahoma* v. *Coffee County*, 204 F. Supp. 794, 800 (E. D. Tenn. 1962); 3 Corbin on Contracts, § 551; 4 Williston on Contracts, § 615 at p. 621; Dees and Ginsberg, *Contract Interpretations and Defective Specifications* (Government Contracts Monograph No. 4, 1975 ed., George Washington University) 1-4.

United States v. *Joseph A. Holpuch Co.*, 328 U. S. 234, on which defendant relies, is not to the contrary. It did not concern the question whether applicable statutory terms must be read into government contracts. *International Association of Machinists* v. *Hodgson*, 515 F. 2d 373 (D. C. Cir. 1975), cited by defendant at oral argument, is also consistent with our holding. That case involved the Secretary of Labor's decision to exercise his discretion not to issue a wage determination under the Service Contract Act. The Davis-Bacon Act, however, confers no such discretion on him.

has been performed.[9] Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

Exhaustion of Administrative Remedies Is Not Required

If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situation, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor.[10] In the *McDaniel* cases, there was no showing that the plaintiff and his class had attempted to secure administrative relief, and in according them a judicial remedy we necessarily decided that there was no requirement that they first seek redress from the contractor or the Department of Labor. Moreover, the administrative procedures seem to be aimed at contractor compliance with the Davis-Bacon Act. Defendant has not shown that the Secretary of Labor has any authority to order a contractor to pay more for Davis-Bacon work already completed.[11] As the Government itself recognized in *McDaniel II*,

9. See 43 F. R. 11379-11383 containing the introductory notice to a recent compilation of the Secretary's wage determinations and decisions specifically applicable to government project work in Kane County. 42 F. R. 30108-30111, 35522, 39847-39848 contain examples of such decisions.

10. See p. 12 of supplemental brief for defendants-appellees in *McDaniel* v. *University of Chicago,* 548 F. 2d 689 (7th Cir. 1976), certiorari denied, 434 U. S. 1033.

11. Enforcement through contract termination and debarment from future contracts is provided for. 40 U. S. C. § 276a-1; 29 C. F. R. § 5.7(d); 29 C. F. R. § 5.6(b)(1). Additionally, the regulations provide for suspension of payments under the contract if the agency (here ERDA) determines the contractor has failed to

(Footnote continued on next page.)

> "Neither the statute nor the regulations promulgated thereunder provide any administraive remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract." (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne v. McDaniel,* 434 U. S. 1033, at 25, n. 20.)

Instead, the regulations are either inadequate as to this class or are merely detailed guidelines for determining what constitutes Davis-Bacon work.[12] While such regulations presumably facilitate contractor compliance, they do not assure a remedy to employees.[13]

The cases cited by defendant for the proposition that the administrative remedies are adequate involved contracts which

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"comply with labor standards stipulations * * *" (29 C. F. R. § 5.9). This remedy seems inadequate to assure the employees of a full recovery in the present case for three reasons: (1) it is based on the assumption that there are stipulations in the contract, (2) it provides for withholding payment only until the violations are discontinued or (apparently in the agency's discretion) enough has been withheld to compensate the employees, and (3) withholding funds is hardly feasible in this case since, as counsel for defendant advised us at oral argument, the defendant is merely a conduit for federal funds. It is thus not clear that such a contractor can or should be required to make restitution out of its own unrelated funds.

Finally, the regulations provide that "[t]he Agency Head may, in appropriate cases * * * request that restitution be made * * *." (29 C. F. R. § 5.10.) Apart from the fact that the precatory language of this regulation gives employees no sure means of redress, this would not seem to be an "appropriate case" for such restitution in view of the defendant's self-styled conduit nature.

12. See n. 11 *supra* and 41 C. F. R. §§ 9-18.701, 9-18.704, 9-18.740.

13. The Disputes clause contained in Article XIX of the contract with respect to the resolution of controversies between the contracting parties is inapplicable because it relates only to questions of fact whereas the question before us is essentially one of law, *vis.*, whether the provisions of the Davis-Bacon Act apply to construction, alteration or repair work performed by defendant's employees, and because this is not a controversy between the contracting parties.

did contain Davis-Bacon Act stipulations. The disputes in those cases focused on the proper classification of work[14] or the determination of wage rates.[15] These and other cases involving the finality of the Secretary of Labor's decisions regarding wage rates and job classifications are not germane to the central question in this case, which is whether the required wage rate stipulations are incorporated into the contract as a matter of law. That is not a question on which deference to agency expertise is appropriate.

In addition, defendant's reliance on Section 4 of the Act (40 U. S. C. § 276a-3)[16] is misplaced since defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates. While 41 C. F. R. § 9-15.5006(i) recommends that wages as well as other costs be set out in ERDA contracts, this does not authorize ERDA to establish non Davis-Bacon Act rates in contracts to which that Act applies. Even if this were the intent of the regulation, since it is not authorized by law it could not qualify as an exception under Section 4 of the Act.[17]

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14. *North Georgia Building & Construction Trades Council* v. *Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1975); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *In re Stanford Linear Accelerator Center,* 16 Wage-Hour Cases 851 (Wage Appeals Board, Department of Labor 1965).

15. *International Union of Operating Engineers* v. *Arthurs,* 355 F. Supp. 7 (W. D. Okla. 1973), affirmed, 480 F. 2d 603 (10th Cir. 1973).

16. Section 4 of the Act provides:

> *"Effect on other Federal laws*
>
> "Sections 276a to 276a-5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."

17. There is other evidence that ERDA is not authorized to set wage rates that do not comply with the Davis-Bacon Act. Executive Order 10789, pursuant to 50 U. S. C. § 1431, authorizes the Secretary of the Atomic Energy Commission (predecessor to ERDA) to

(Footnote continued on next page.)

Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII.

The judgment dismissing the complaint is reversed and the cause is remanded for further consideration consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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enter into contracts containing certain limitations. Paragraph 13 of that Order specifically states that nothing in the Order shall be construed to allow the Secretary to set aside the requirements of the Davis-Bacon Act. If he already had that power by federal law, this provision in the Executive Order would be both superfluous and unavailing.

APPENDIX B.

Memorandum Opinion and Order

This is an action brought on behalf of the named plaintiff, Stanley Coutu, individually and as a representative of all persons similarly situated, seeking relief from certain practices in payment of wages by defendant to members of plaintiff's class. The complaint alleges seven causes of action, the first of which is based on the defendant's violation of the provisions of the Davis-Bacon Act, 40 U. S. C. § 276(a). The second cause of action alleges a breach of defendant's contractual obligations to plaintiff and the class under the Davis-Bacon Act contract set forth in the first cause of action and incorporated by reference in the remaining causes of action. Jurisdiction is predicated on 28 U. S. C. §§ 1331 and 1337, and under the Davis-Bacon Act, 40 U. S. C. § 276(a). The remaining causes of action are based on common law counts for fraud, restitution, and payment of indebtedness on account and contract. Jurisdiction is predicated on the allegation that each cause of action derives from a nucleus of operative fact common with the first cause of action, and is pendent thereto.

Leave to proceed on behalf of the class alleged has not been granted.

Defendant has moved for dismissal of plaintiff's complaint for any or all of eight reasons; the first three of which revolve around the same issue and will be treated collectively.

1. Defendant first moves for dismissal for the reason that this Court lacks jurisdiction over the subject matter of the complaint and/or the complaint fails to state a claim upon which relief can be granted, by reason of the plaintiff's failure to allege prior exhaustion of administrative procedures.

2. In the alternative, defendant urges the Court to defer, under the doctrine of Primary Jurisdiction, to administrative resolution of issues relating to application of the Davis-Bacon Act to work alleged under the sued-upon contract.

3. Furthermore, asserts defendant, the complaint fails to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint, by reason of the absence of any allegations of determinations by the Atomic Energy Commission (now U. S. Energy and Research Development Administration, hereinafter referred to as ERDA), or by the Secretary of Labor, specifying that compensation is to be paid for work performed under the contract different than the rates of compensation actually set forth therein and approved by the United States through ERDA, or that defendant has not in fact compensated employees in accord with the rates specified in the contract, as approved by the United States through ERDA.

The defendant in its memorandum in support of its motion to dismiss has summarized the issues raised in paragraphs 1, 2 and 3 of its motion as follows: whether this Court has jurisdiction as a matter of law, or should as a matter of policy undertake to review, revoke or overrule, retroactively, determinations made by the agents of the United States government in the contract in question.

In his complaint, plaintiff has alleged a contract between the defendant and the United States for an amount in excess of $2,000 which provides for, among other things, construction, alteration and repair of public buildings or public works of the United States. Plaintiff has alleged that this contract requires or involves the employment of mechanics and laborers, and has further alleged that he and all the members of his class are mechanics and laborers employed by defendant pursuant to the said contract. The contract which plaintiff alleges exists between defendant and the United States is commonly referred to as Contract No. AT (49-8)-3000, a copy of which has been submitted to this Court by defendant.

In Paragraphs III and IV of what plaintiff labels his first cause of action, plaintiff alleges that the defendant has failed to pay to members of plaintiff's class the minimum wages required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq*. This allegation contradicts the reasons which defendant cites for dismissal in the third paragraph of his motion. However, this allegation is not totally borne out by the alleged Contract No. AT (49-8)-3000.

Though the contract contains wage provisions, it does not contain the standard provisions found in a Davis-Bacon contract. 41 C. F. R. § 1-18.703-1. And as defendant has pointed out in the memorandum in support of its motion, the contract contains a clause in the labor provisions section which reads as follows:

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association (defendant herein), with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission (i.e., ERDA). . . .
>
> (Contract AT (49-8)-3000, p. 54)

The defendant relies on the above contract provision and the absence of standard Davis-Bacon Act provisions to support its position that the contract in question is not a Davis-Bacon Act contract. From this position, defendant reasons that plaintiff has no cause of action pursuant to the contract upon which plaintiff can possibly base a claim for relief or over which the Court can take jurisdiction.

The defendant in its memorandum has soundly argued the position that the administrative determinations of the contract-

ing agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and Appeals Board of the U. S. Department of Labor, 29 C. F. R. 5.11; 41 C. F. R. 7.10. Extrapolating on this position, defendant asserts that for this Court to take jurisdiction over plaintiff's alleged cause of action would be for the Court to subject the determinations of the Secretary of Labor to judicial review. This, the defendant asserts, the Court may not do, citing *United States* v. *Binghamton Construction Co., Inc.*, 347 U. S. 171, 74 S. Ct. 438 (1954) and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 60 S. Ct. 869 (1940).

The plaintiff, in response to defendant's motion to dismiss and memorandum in support thereof, relies exclusively on the recent Seventh Circuit decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975).

In *McDaniel*, the Court had before it a complaint containing allegations almost identical to those in the case at bar. The District Court concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in Federal Court, under the circumstances alleged in the complaint. On appeal, the Circuit Court agreed that § 276a-2(b) of the Davis-Bacon Act did not create a cause of action, cognizable in Federal Court, for one in plaintiff's position; the Court did conclude, however, that "[W]age-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in State Court actions or Federal Court actions where jurisdiction is properly based." *McDaniel*, 512 F. 2d 583, 586. The Court discussed the constitutional basis of the Davis-Bacon Act, finding the Act to be significantly based on the commerce clause. The Court therefore concluded that ". . . [P]laintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted

and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337." *McDaniel,* 512 F. 2d 583, 588.

Defendant has attempted to distinguish *McDaniel* on the grounds that in *McDaniel,* there was no question but that the contract involved was a Davis-Bacon contract, while in the case at bar defendant asserts that the contract in question specifically excludes Davis-Bacon Act work. If true, plaintiff's reliance on *McDaniel* would surely be misplaced.

However, the purpose of a motion to dismiss is to test the legal sufficiency of the allegations of the complaint. 2A Moore's Federal Practice, 2265, 2266. The plaintiff herein has properly alleged a Davis-Bacon Act contract in his complaint, the only difficulty being that the specific contract which plaintiff alleges, Contract No. AT (49-8)-3000, does not bear out all of plaintiff's allegations. It does not, however, conclusively foreclose the possibility that plaintiff has stated a claim upon which relief may be granted.

Defendant relies on the contract clause taken from the labor provisions of the contract (quoted above) for its position that the contract does not contemplate the performance of Davis-Bacon work by defendant's employees. This clause, however, does not preclude the possibility of performance of Davis-Bacon Act work pursuant to the contract, albeit by someone other than defendant's employees. Furthermore, the Court is apprised of a correspondence between the defendant and the United States Atomic Energy Commission (ERDA) dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performing the Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon determinations by ERDA with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor.

The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA

pursuant to the contract, and as to performance of Davis-Bacon Act work, properly or improperly assigned to plaintiff and the class by defendant, as alleged by plaintiff. This Court cannot make factual determinations on a motion to dismiss. *Schafly* v. *Volpe,* 495 F. 2d 273 (7th Cir. 1974). Rather the complaint must be liberally construed with all factual allegations deemed to be true and with doubts resolved in favor of the pleader. *Parr* v. *Great Lakes Express Co.,* 484 F. 2d 767 (7th Cir. 1973). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 355 U. S. 41, 78 S. Ct. 99 (1957).

Thus, accepting plaintiff's allegations as true and construing all doubts in favor of plaintiff, this Court deems that plaintiff has alleged a cause of action in Count II on a Davis-Bacon contract which states a claim upon which relief may be granted and over which this Court has jurisdiction, based on the Seventh Circuit's finding in *McDaniel* that in such a cause of action jurisdiction may be properly predicated on 28 U. S. C. § 1337. Having asserted jurisdiction over this cause of action, the Court also has pendent jurisdiction to decide the state of claims arising out of the same facts, which have been set forth in counts three through seven of the complaint. *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966). This Court does not thereby seek to review the determinations of the Secretary of Labor of the contracting agency; rather the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract.

Defendant's fourth reason for dismissal of plaintiff's complaint is based on the effect of the Portal-to-Portal Pay Act time limitations, 29 U. S. C. §§ 255, 256, which bar any action for unpaid minimum wages under the Davis-Bacon Act which is not commenced within two years after the accrual of the cause

of action. Defendant asserts that under the provisions of 29 U. S. C. § 256, governing when an action is commenced for purposes of tolling the statute of limitations set forth in 29 U. S. C. § 255, the cause of action herein is determined to have been commenced as to the named plaintiff on April 9, 1975, when his complaint and his written consent to become a party plaintiff were filed. Therefore, as to the named plaintiff, Stanley Coutu, the statute of limitations under § 255 would bar any cause of action for minimum wages which accrued prior to April 9, 1973.

Some Federal Courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss, *see* Annot., 61 A. L. R. 2d 300, 327. However, in the Seventh Circuit a motion to dismiss raising the defense of the statute of limitations is proper where the bar of the statute can be seen from the face of the complaint. *Kincheloe* v. *Farmer,* 214 F. 2d 604 (7th Cir. 1954), *cert. denied,* 348 U. S. 920, 75 S. Ct. 306, 99 L. Ed. 721 (1955). In light of the Portal-to-Portal Act provisions with respect to actions under the Davis-Bacon Act, and in light of Rule 9A of the Federal Rules of Civil Procedure, the Court finds that defendant has properly raised the statute of limitations in his motion to dismiss.

The statutory language of § 255 clearly makes the statute of limitations applicable to plaintiff's Federal cause of action which predicates jurisdiction on 28 U. S. C. § 1337. The Court must apply state substantive law to state claims taken under pendent jurisdiction by a Federal Court. But while a statute of limitations is often considered to be a substantive matter, *J. M. Blythe* v. *Blalock,* 310 F. 2d 77 (5th Cir. 1962), the express purpose of 29 U. S. C. § 255 was to substitute a uniform Federal limitations period for the diverse periods provided under statutes of the several states. 29 U. S. C. § 251; *Hodgson* v. *Humphries,* 454 F. 2d 1279 (10th Cir. 1972). Thus the Court finds that the statute of limitations of § 255 is equally applicable to the

state claims taken under pendent jurisdiction insofar as they arise by virtue of a Federal statute, and the Court's jurisdiction over them depends on their pendency to a cause of action under a statute with a two-year limitation.

There remains the question, however, whether the two-year statute of limitations is applicable on the three-year limitation period for "willful" violations. 29 U. S. C. § 255(a). Though plaintiff has not specifically alleged "willfulness" in his complaint, with the exception of Count II, he has sufficiently pleaded his allegations to raise a factual issue as to whether defendant's actions were willful. The Court at this juncture cannot determine the issue of willfulness, but rather should defer a ruling on this issue until further evidence is presented at trial. *Bormann* v. *Long Island Press Publishing Co., Inc.,* 379 F. Supp. 951 (1974).

Defendant's fifth reason cited for dismissal of plaintiff's complaint is that it fails to state a claim upon which relief can be granted because of plaintiff's failure to allege a valid class under Rule 23 of the Federal Rules of Civil Procedure. The action is brought on behalf of the named plaintiff, individually, and as a representative of the class. Therefore, dismissal of the class would not dismiss the complaint. There has as yet been no determination as to whether the action may be maintained as a class action pursuant to Rule 23 of the Federal Rules. For these reasons, defendant's motion to dismiss for failure to allege a valid class action is unwarranted at this time.

Defendant's sixth ground for dismissal is based on plaintiff's failure to prosecute his claim pursuant to the provisions of the Miller Act, 40 U. S. C. § 270a-d, which requires defendant to procure a bond for payment of laborers and mechanics pursuant to contracts of the type in question. Defendant also asserts that plaintiff has failed to prosecute his claim under the provisions of the Davis-Bacon Act, 40 U. S. C. § 270a-2(b), which authorizes withholding of funds from the contractor for payment of

unpaid laborers and mechanics employed pursuant to the contract.

The cause of action on defendant's contractual commitment under the Davis-Bacon contract is distinct from that on a Miller Act bond. *McDaniel,* 512 F. 2d 583 (7th Cir. 1975). The Miller Act cause of action arises when the contractor has furnished a bond, and when the funds withheld pursuant to § 276a-2(b), if any, are exhausted. In *McDaniel,* it was undisputed that the contractor had not supplied a Miller Act bond, nor had the government withheld funds for payment of wage claims. In the case at bar, there has been no allegation or determination that a Miller Act bond exists or that funds were withheld from the contractor by the government. The Court needs to determine whether exhaustion of these remedies is a condition precedent to a cause of action on defendant's contract commitments unless it be shown that such remedies do, in fact, exist. The withholding of funds by the government is not mandatory under 40 U. S. C. § 276a-2(b). And, as pointed out in *McDaniel,* the Miller Act bond can be waived in certain circumstances. 40 U. S. C. § 270(e). There has been no claim that such waiver here would have been unauthorized, and the complaint does not suggest that plaintiff's claim is based on defendant's failure to provide a Miller Act bond. Thus the complaint cannot be dismissed on the grounds asserted by defendant in paragraph six of his motion.

Paragraphs seven and eight of defendant's motion charge that the Court cannot take jurisdiction over the claims of plaintiff's complaint for the reason that plaintiff fails to allege the requisite $10,000 damages for Federal jurisdiction and that the Court has no jurisdiction under § 1337. Defendant further asserts that, since the Court lacks jurisdiction over the Federal claims, it cannot assert pendent jurisdiction over the state claims.

These issues have already been disposed of by the Court. The Court recognizes defendant's claim of jurisdiction under 28 U. S. C. § 1337 for which no jurisdictional amount need

be alleged. Having asserted Federal jurisdiction over plaintiff's Count II, the Court has pendent jurisdiction of the claims in Counts III through VII. *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966).

Therefore, defendant's motion to dismiss is granted as to Count I. The motion is denied as to Counts II through VII. The statute of limitations bars any cause of action of the named plaintiff which accrued prior to April 9, 1972. Those claims under Counts II, IV, V, VI and VII of the named plaintiff accruing between April 9, 1972 and April 9, 1973 are not dismissed but are subject to determinations at trial concerning the willfulness of the violations. Count III is subject only to the three-year statute of limitations.

Dated: October 8, 1975.

Enter:

/s/ Frank McGarr

APPENDIX C.

MEMORANDUM ORDER

This dispute arises out of a contract for the design, construction, and operation of the National Accelerator Laboratories, between defendant Universities Research Association, Inc. and the United States government acting through the Atomic Energy Commission and its successor, the Energy Research and Development Administration (hereinafter ERDA). Plaintiff Stanley Coutu filed this class action claiming that defendant failed to duly compensate plaintiff class for work it performed during the construction of the facility. The class has been certified and is described as follows:

> All "mechanics and/or laborers" employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America "for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States" who have been paid wages less than "the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State" in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*

Defendant is a not-for-profit consortium of universities formed for the purpose of facilitating scientific research and charged with the responsibility for design, procurement, and fabrication of the accelerator. Jurisdiction for Counts I and II of the complaint is invoked pursuant to 28 U. S. C. §§ 1331, 1337, and this court's pendent jurisdiction is invoked to entertain the remaining counts. This cause is before the court on defendant's motion for summary judgment.

Count I and II of plaintiff's complaint are the core federal claims contained in this suit. In Count I, plaintiff class purported to state a claim on the theory that defendant failed to compensate plaintiff class in accordance with the prevailing wage determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, 40 U. S. C. § 279a, *et seq.*, whether or not the wage determinations were incorporated in the contract. This count was dismissed by the memorandum opinion and order filed by the Honorable Frank McGarr.

In Count II, plaintiff class alleges that the contract falls within the purview of the Davis-Bacon Act, and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." Judge McGarr denied defendant's previous motion to dismiss this count on the ground that plaintiff stated a claim on which relief could be granted and over which the court had jurisdiction in accordance with *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir.), *vacated and remanded on other grounds,* 423 U. S. 810 (1975). Judge McGarr held that the contract did not preclude performance of Davis-Bacon work by defendant's employees pursuant to proper Davis-Bacon determinations by the contracting agency, ERDA, and the necessary modifications of the contract. [See Memorandum Opinion and Order at p. 8] Accordingly, plaintiff class was given "leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract." [*Id.* at p. 10]

Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, claiming that there is no issue of material fact and defendant is entitled to judgment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is

Contract No. EY-76-C-02-3000, as amended, formerly designated AT(49-8)-3000, and that "[n]o Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract . . ."[Affidavit of John R. Frazier, ¶ 3]

Plaintiff class has filed a memorandum in opposition to defendant's motion. Plaintiff class as much concedes that the contract fails to include Davis-Bacon specifications [Plaintiff's memorandum at 1-3], but it argues that this amounts to a violation of the act which should not serve to shield defendant from plaintiffs' implied right of action found in *McDaniel* v. *University of Chicago,* 512 F. 2d 588 (7th Cir.), *vacated and remanded,* 423 U. S. 810 (1975), *reaff'd,* 548 F. 2d 689 (7th Cir. 1977). Plaintiff class argues that the following contract language contemplated the likelihood that Davis-Bacon Act work would be performed.

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

Based on its interpretation of the contract clause, plaintiff class argues that there is a material issue of fact with regard to who performed the contemplated Davis-Bacon work for defendant over the years. Plaintiff class has offered no affidavit and has failed to point to any material adduced during discovery which would controvert the affidavit of John Frazier.

On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this con-

tract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law. *See Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804, 808 (7th Cir. 1973).

The Davis-Bacon Act is essentially a minimum wage law which requires that "specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. . . ." 40 U. S. C § 276a. The Act is designed to protect employees of persons contracting with the government from sub-standard earnings. *United States* v. *Binghamton Construction Co.*, 347 U. S. 171 (1954). The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18.701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. *See Walsh* v. *Schlecht*, 97 S. Ct. 679, 686 (1977); *United States* v. *Binghamton Construction Co.*, 347

U. S. 171, 172 (1954); *McDaniel* v. *University of Chicago, supra; North Georgia Bldg. & C. T. C.* v. *U. S. Dept. of Transportation,* 399 F. Supp. 58, 60-61 (N. D. Ga. 1975); 41 C. F. R. § 1-18.703-1 (1974).

After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties. *See Framlau Corporation* v. *Dembling,* 360 F. Supp. 806, 809 (E. D. Pa. 1973) and cases cited therein. This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed.

The court has examined the pendent counts raised in the complaint and due to the legally insubstantial nature of the federal claims raised in Counts I and II, the court, in the exercise of its discretion declines to assert jurisdiction over the claims raised therein. *See United Mine Workers of America* v. *Gibbs,* 383 U. S. 715 (1966); *Ohio Inns, Inc.* v. *Nye,* 542 F. 2d 673 (6th Cir. 1976), *cert. denied,* 45 U. S. L. W. 3651 (March 28, 1977); *McIlhenny* v. *American Title Ins. Co.,* 418 F. Supp. 364, 372 (E. D. Pa. 1976). Accordingly, this suit is dismissed in its entirety.

So ordered.

/s/ George N. Leighton
George N. Leighton,
United States District Judge

Dated: November 29, 1977

APPENDIX D.

§ 276a. RATE OF WAGES FOR LABORERS AND MECHANICS

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as

may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage deter-

minations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under section 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

§ 276a—1. TERMINATION OF WORK ON FAILURE TO PAY AGREED WAGES; COMPLETION OF WORK BY GOVERNMENT

Every contract within the scope of sections 276a to 276a—5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the

contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

§ 276a—2. PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages of voluntarily made refunds.

§ 276a—3. Effect on Other Federal Laws

Sections 276a to 276a—5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

§ 276a—4. Effective Date of Sections 276a to 276a—5

days after August 30, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935.

§276a—5. Suspension of Sections 276a to 276a—5 During Emergency

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a—5 of this title.

§ 276a—6. Appropriation

§ 276a—7. Application of Sections 276a to 276a—5 to Contracts Entered Into Without Regard to Section 5 of Title 41

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a—5 of this title, if such Act would otherwise be applicable to such contract.

§ 276c. Regulations Governing Contractors and Subcontractors

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public

works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.